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17 **UNITED STATES DISTRICT COURT**
18 **DISTRICT OF NEVADA**

19 FEDERAL TRADE COMMISSION,)

20 Plaintiff,)

21 v.)

22 IVY CAPITAL, INC., *et al.*,)

23 Defendants, and)

24 CHERRYTREE HOLDINGS, LLC, *et al.*,)

25 Relief Defendants.)

Case No. 2:11-cv-00283-JCM -GWF

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO MOTION TO
DISMISS OF DEFENDANTS
IVY CAPITAL, INC., ET AL.**

26 _____)

1 **I. INTRODUCTION**

2 Thirteen corporate defendants¹ (collectively, the “Corporate Movants”) argue that the
3 twenty-nine page, one hundred-fourteen paragraph Complaint filed in this matter does not
4 provide them with sufficient information about the violations of the FTC Act alleged against
5 them in Counts I through VII to allow them each to adequately prepare an answer, and that those
6 counts must therefore be dismissed pursuant to Rule 9(b) of the Federal Rules of Civil
7 Procedure. The motion to dismiss as to the Corporate Movants should be denied for two
8 independent reasons: first, Rule 9(b) does not apply to enforcement actions under the FTC Act;
9 and second, the deceptive practices underlying the liability of each of the Corporate Movants are
10 alleged with particularity that meets or exceeds the requirements of Rule 9(b).

11 Individual defendants Kyle Kirschbaum, John Harrison, and Steven Lyman (collectively,
12 the “Individual Movants”) also move that Counts I through VII against them should be dismissed
13 pursuant to Rule 9(b), and further move that Counts VIII and IX, which allege violations of the
14 Do Not Call provisions of the Telemarketing Sales Rule, should be dismissed for failure to state
15 a claim against them under the liberal “notice” pleading standard of Rule 8(a). The Individual
16 Movants argue that all nine counts alleged against them are deficient because the counts do not
17 allege that each individual defendant personally made deceptive representations or personally
18 committed telemarketing violations. As explained below, however, the Complaint’s allegations
19 that Kyle Kirschbaum, John Harrison, and Steven Lyman exercise control over and engage in
20 hands-on management of the Ivy Capital common enterprise are sufficient to state a claim
21 against each for individual liability for the enterprise’s violations on all nine counts.

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¹ The moving corporate defendants are Ivy Capital, Inc.; Fortune Learning System, LLC;
25 Vianet, Inc.; 3 Day MBA, LLC; Dream Financial; ICI Development, Inc.; Ivy Capital, LLC;
Logic Solutions, LLC; Oxford Debt Holdings, LLC; Revsynergy, LLC; Global Finance Group,
LLC; Virtual Profit, LLC; and Sell It Vizions, LLC.

1 Finally, seven relief defendants² (the “Relief Movants”) have moved that Count X, the
2 only count alleged against them, should be dismissed, arguing that if the Complaint fails to
3 adequately allege the underlying wrongdoing of the defendants, the Relief Movants cannot be
4 held liable for receiving ill-gotten gains from these defendants. This argument is meritless, as
5 the Complaint sufficiently alleges the defendants’ liability for violations of the FTC Act and the
6 Telemarketing Sale Rule.

7 **II. BACKGROUND**

8 On February 22, 2011, the Federal Trade Commission (the “Commission” or “FTC”)
9 filed a Complaint alleging that twenty-two business entities acting as a common enterprise (the
10 “Ivy Capital Enterprise”) were violating the Federal Trade Commission Act and the
11 Telemarketing Sales Rule by deceptively marketing and selling products and services that would
12 purportedly assist consumers in developing their own lucrative Internet businesses. [D.E. 1.]
13 The Complaint also states claims against the eight individuals who control the entities
14 constituting the Ivy Capital Enterprise and names as relief defendants six corporations and four
15 individuals who have shared in its ill-gotten gains. [*Id.*]

16 Simultaneously with the filing of its Complaint, the FTC moved for a temporary
17 restraining order, supporting its request with a sixty-one page brief and four volumes of exhibits
18 consisting of more than eight hundred pages. [D.E. 6.] The Court granted the FTC’s motion,
19 issuing an order that halted the Ivy Capital Enterprise’s activities, appointed a receiver, and froze
20 assets pending a preliminary injunction hearing. [D.E. 12.]

21 In advance of the preliminary injunction hearing, the various defendants and relief
22 defendants filed opposition papers, including a fifty-five page brief from the movants supported
23
24

25 ² The moving relief defendants are Cherrytree Holdings, LLC; S&T Time, LLC; Virtucon, LLC;
Mowab, Inc.; Kierston Kirschbaum; Melyna Harrison; and Tracy Lyman.

1 by twenty-two exhibits [D.E. 46, 51].³ The FTC also filed a forty-three page omnibus reply brief
2 that included nearly eight hundred additional pages of exhibits. [D.E. 73.] At a hearing held on
3 March 23, 2011, the Court, having considered the filings and argument from the parties, granted
4 the FTC's request for a preliminary injunction, which was entered on the docket two days later.
5 [D.E. 88, 91.]

6 **III. ARGUMENT**

7 **A. Rule 9(b)'s Heightened Pleading Requirements Do Not Apply 8 to Allegations of FTC Act Violations.**

9 The movants' arguments for dismissal of Counts I through VII are based on the faulty
10 premise that the heightened pleading requirements of Rule 9(b) apply to FTC enforcement
11 actions. Rule 9(b) requires that, "[i]n alleging fraud or mistake, a party must state with
12 particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). A claim of
13 deceptive practices under Section 5 of the FTC Act, however, "is not a claim of fraud as that
14 term is commonly understood or as contemplated by Rule 9(b)," *FTC v. Freecom Communs.,*
15 *Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005), as both the elements and purpose of an FTC
16 enforcement action distinguish it from a fraud claim.

17 Unlike an action for common law fraud, the Commission does not need to prove scienter,
18 reliance, or injury to establish a violation of Section 5 of the FTC Act. *Id.*; *see also, e.g., FTC v.*
19 *Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) ("[T]he FTC is not required to
20 show that a defendant *intended* to defraud consumers"); *FTC v. Figgie Int'l*, 994 F.2d 595,
21 605–06 (9th Cir. 1993) (unlike common law fraud, proof of subjective reliance by individual
22

23 ³ During the same time period, the receiver appointed under the Temporary Restraining Order
24 filed a report of his activities to date that described how "the Corporate Defendants operated 20
25 companies, including seven nondefendant companies, exchanged or traded services, provided
common management including accounting services, and essentially operated as a common
enterprise." [D.E. 67 at 1.]

1 consumers is not required in FTC enforcement actions). These substantive differences stem in
 2 part from the nature of a Section 5 action, which is

3 not a private or common law fraud action designed to remedy a
 4 singular harm, but a government action brought to deter deceptive
 5 acts and practices aimed at the public and to obtain redress on
 6 behalf of a large class of third-party consumers who purchased
 7 Defendants' products and services over an extended period of time.

8 *Freecom Communs.*, 401 F.3d at 1204 n.7; *see also Figgie*, 994 F.2d at 605 (“Section 13 of the
 9 FTC Act differs from a private suit for fraud, however. Section 13 serves a public purpose by
 10 authorizing the Commission to seek redress on behalf of injured consumers.”).

11 In light of the significant differences between FTC enforcement actions and common law
 12 fraud claims, numerous courts have held that the heightened pleading requirements of Rule 9(b)
 13 do not apply to alleged violations of the FTC Act. *E.g.*, *Freecom Communs.*, 401 F.3d at
 14 1204 n.7; *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 388 (D. Md. 2009); *FTC v. Nat'l*
 15 *Testing Servs., LLC*, No. 05-0613, 2005 U.S. Dist. LEXIS 46485, at *5 (M.D. Tenn. Aug. 18,
 16 2005); *FTC v. SkyBiz.com, Inc.*, No. 01-396, 2001 U.S. Dist. LEXIS 26314, at *11 (N.D. Okla.
 17 Aug. 2, 2001); *FTC v. Communidyne, Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,439, at 71,313 (N.D.
 18 Ill. Dec. 3, 1993).⁴ This Court's concurrence with this substantial line of cases would alone be a
 19 sufficient basis for denying the motion to dismiss with regard to Counts I through VII as to all
 20 movants.

21 **B. The Complaint Allegations Concerning the Corporate Movants'**
 22 **Deceptive Acts Satisfy Rule 9(b)'s Heightened Pleading Requirements.**

23 Even if Rule 9(b) were applicable to alleged violations of the FTC Act, the Complaint's
 24 detailed allegations concerning each of the Corporate Movants' unlawful acts are more than

25 ⁴ The movants cite one decision to the contrary, *FTC v. Lights of America, Inc.*, No. 10-1333,
 2010 U.S. Dist. LEXIS 137088 (C.D. Cal. Dec. 17, 2010). [D.E. 86 at 4 n.8.] This Court is not
 bound by *Lights of America*, and may decline to apply Rule 9(b)'s requirements to FTC
 enforcement actions in view of the considerations discussed above.

1 sufficient to satisfy the Rule’s requirements. A pleading is sufficient under Rule 9(b) “if it
2 identifies the circumstances constituting fraud so that a defendant can prepare an adequate
3 answer from the allegations.” *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir.
4 1989). Thus, “mere conclusory allegations of fraud are insufficient.” *Id.* Additionally, in
5 actions against multiple defendants, a plaintiff must generally avoid “ ‘everyone did everything’
6 allegations” and instead differentiate which of the defendants is responsible for which conduct.
7 *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011). In some circumstances, however, it may
8 be difficult to attribute particular conduct to each defendant, and the plaintiff should then allege
9 the collective conduct with particularity and include the role of individual defendants “where
10 possible.” *Moore*, 885 F.2d at 540 (using the example of corporate fraud).

11 The thirteen Corporate Movants argue that the claims against each must be dismissed
12 because “the allegations do not provide any details about each separate defendant’s alleged role
13 in the conduct described,” and thus each Corporate Movant lacks sufficient information about its
14 alleged conduct to prepare an adequate answer. [D.E. 86 at 6.] As even a cursory review of the
15 Complaint will confirm, this argument is specious.

16 The Complaint against the Ivy Capital Enterprise does not make “mere conclusory
17 allegations” of deceptive conduct; rather, it provides a detailed breakdown of the enterprise’s
18 conduct through more than sixty paragraphs. [D.E. 1, ¶¶ 48–111.] Nor does the Complaint rely
19 on “ ‘everyone did everything’ allegations”—although such allegations would likely be justified
20 given the defendants’ convoluted common enterprise, which significantly complicates the task of
21 identifying which of the enterprise’s tentacles took which actions. *Cf. Moore*, 885 F.2d at 540.
22 Instead, the Complaint takes pains to separate defendants based on their role and function. [*See*,
23 *e.g.*, D.E. 1, ¶ 46 (differentiating “Primary Defendants,” “Upsell Defendants,” “Lead Generating
24 Defendants,” and “Shell Defendants”).]

25

1 For example, the Complaint alleges that movants Ivy Capital, Inc., Fortune Learning
2 System, LLC, and Vianet, Inc., along with two other corporate defendants (collectively, the
3 “Primary Defendants”), were conducting a telemarketing campaign to sell business coaching
4 services for the Ivy Capital Enterprise. [D.E. 1, ¶¶ 46, 48.] The relevant allegations detail the
5 representations that Ivy Capital, Inc., Fortune Learning System, LLC, Vianet, Inc., and the two
6 other Primary Defendants made to consumers concerning the earnings potential of the program,
7 the time commitment required, and the services provided [*id.*, ¶¶ 50–57], and explain how those
8 representations are false [*id.*, ¶¶ 56, 62]. They also describe tactics used by the five Primary
9 Defendants to discourage consumers from researching the service before buying [*id.*, ¶¶ 53, 61]
10 and the method of payment used and prices charged [*id.*, ¶¶ 58–61]. Given the specificity of
11 these allegations, the Complaint provides Ivy Capital, Inc., Fortune Learning System, LLC, and
12 Vianet, Inc., with more than sufficient information to understand and respond to the claims
13 alleged against them.

14 The Complaint similarly details the role played in the Ivy Capital Enterprise by each of
15 the Corporate Movants:

- 16 • Global Finance Group, LLC, and Virtual Profit, LLC, are alleged to have each
17 been generating leads for the Primary Defendants’ telemarketing campaign by
18 obtaining telephone numbers of consumers who responded to e-mails and
19 advertisements about work-at-home or business opportunities [*id.*, ¶¶ 46, 51];
- 20 • 3 Day MBA, LLC, is one of eight corporate defendants alleged to have been
21 conducting a telemarketing campaign to sell additional goods and services to
22 consumers who purchased business coaching services from the Ivy Capital
23 Enterprise [*id.*, ¶¶ 46, 63–67]; and
- 24 • Dream Financial; ICI Development, Inc.; Ivy Capital, LLC; Logic Solutions,
25 LLC; Oxford Debt Holdings, LLC; Revsynergy, LLC; and Sell It Vizations, LLC,

1 are alleged to be shell entities that have been used to advance the common
2 enterprise by acting as fronts for other corporate defendants [*id.*, ¶ 46].

3 Each of the Corporate Movants objects to having been grouped together in the Complaint
4 with other defendants who were engaging in the same conduct, but these groupings did not
5 deprive any of the Corporate Movants of information needed to answer the Complaint.
6 Accordingly, the Corporate Movants' motion directed to Counts I through VII is without merit.

7 **C. The Complaint Sufficiently Alleges the Individual Movants'**
8 **Liability for the Violations of the Ivy Capital Enterprise.**

9 Individual Movants Kyle Kirschbaum, John Harrison, and Steven Lyman argue that,
10 because the Complaint does not allege specific acts that each personally undertook in violation of
11 the FTC Act or the Telemarketing Sales Rule, Counts I–VII against them must be dismissed for
12 failure to comply with the particularity requirements of Rule 9(b), and Counts VIII–IX against
13 them must be dismissed for failure to comply with the liberal “notice” pleading requirements of
14 Rule 8(a). [D.E. 86 at 5–6.] These arguments fail: the FTC has sufficiently pleaded all nine
15 counts against Ivy Capital, Inc., and the Ivy Capital Enterprise,⁵ and the Individual Movants can
16 be held individually liable for the violations of these entities.

17 When determining whether an individual defendant should be held liable for the FTC Act
18 violations of a corporation, there are two distinct standards: the first applies when determining
19 whether an individual should be held liable for permanent injunctive relief and the other applies
20 when determining whether the individual should be held liable for monetary relief. To obtain
21 injunctive relief, the Commission must establish that the individual participated directly in the

22
23 ⁵ As shown *supra* Section III.B, the Complaint sufficiently alleges Counts I–VII against Ivy
24 Capital, Inc., and the Ivy Capital Enterprise. The movants do not challenge the sufficiency of the
25 Complaint's allegations supporting Counts VIII and IX against the corporate defendants
controlled by Kyle Kirschbaum, John Harrison, and Steven Lyman. [*See* D.E. 1, ¶¶ 72–73, 105–
08.]

1 acts or practices or had the authority to control the company involved in the unlawful practices.
2 *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). To obtain monetary
3 relief, the FTC must additionally show that the individual had knowledge of the acts or practices.
4 *Id.*

5 The Complaint alleges the basis for holding each of the Individual Movants liable for the
6 violations of the Ivy Capital Enterprise:

- 7 • Kyle Kirschbaum is alleged to (1) have co-founded Ivy Capital, Inc.; (2) be one of
8 four co-owners of Ivy Capital, Inc., each of which holds a 25% stake; (3) be the
9 President of Ivy Capital, Inc.; (4) have been the Director and President of Vianet,
10 Inc.; (5) be an officer of three additional entities that are part of the Ivy Capital
11 Enterprise; and (6) have formulated, directed, controlled, had the authority to
12 control, or participated in the acts set forth in the Complaint [D.E. 1, ¶¶ 28, 46];
- 13 • John Harrison is alleged to (1) have co-founded Ivy Capital, Inc.; (2) be one of
14 four co-owners of Ivy Capital, Inc., each of which holds a 25% stake; (3) be the
15 Treasurer and Director of Ivy Capital, Inc.; (4) have been the Secretary of Vianet,
16 Inc.; (5) be an officer, agent, or member of eleven additional entities that are part
17 of the Ivy Capital Enterprise; and (6) have formulated, directed, controlled, had
18 the authority to control, or participated in the acts set forth in the Complaint [D.E.
19 1, ¶¶ 29, 46]; and
- 20 • Steven Lyman is alleged to (1) have co-founded Primary Defendant Ivy Capital,
21 Inc.; (2) be one of four co-owners of Ivy Capital, Inc., each of which holds a 25%
22 stake; (3) be the Secretary of Ivy Capital, Inc.; (4) have been the Treasurer of
23 Vianet, Inc.; (5) be an officer of five additional entities that are part of the Ivy
24 Capital Enterprise; and (6) have formulated, directed, controlled, had the authority
25 to control, or participated in the acts set forth in the Complaint [D.E. 1, ¶¶ 30, 46].

1 These allegations are sufficient to state claims against each of the Individual Movants for both
2 injunctive and monetary relief. *See, e.g., FTC v. Commerce Planet, Inc.*, No. 09-1314 (C.D. Cal.
3 Feb. 12, 2010) (denying a motion to dismiss where the complaint alleged “the most important
4 fact for individual liability under Section 5—that [the defendant] was the president and director
5 of the company that owned and operated the allegedly deceptive website”); *FTC v. Hang-Ups*
6 *Art Enters., Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,709, at 79,056 (C.D. Cal. Sept. 27, 1995) (an
7 allegation that an individual defendant “directed, controlled, formulated, or participated in the
8 acts and practices of the corporate defendant” sufficiently alleges that the individual knowingly
9 participated in wrongful conduct).

10 The Individual Movants suggest that the heightened pleading requirements of Rule 9(b)
11 should apply to the allegations concerning their individual liability for the deceptive acts of the
12 Ivy Capital Enterprise. [D.E. 86 at 5.] This argument fails for at least three reasons.

13 First, as already shown *supra* Section III.A, Rule 9(b) does not apply at all to FTC
14 enforcement actions.

15 Second, even assuming, *arguendo*, that Rule 9(b) were to apply to FTC enforcement
16 actions, this would not require that the FTC plead the Individual Movants’ control or knowledge
17 with particularity. The elements relevant to establishing individual liability for the Ivy Capital
18 Enterprise’s unlawful practices—control, participation, knowledge—do not constitute or involve
19 fraud, and thus would not need to be pleaded with particularity. *See* Fed R. Civ. P. 9(b) (“In
20 alleging fraud or mistake, a party must state with particularity *the circumstances constituting*
21 *fraud or mistake.*” (emphasis added)); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th
22 Cir. 2003) (where a complaint alleges “some fraudulent and some non-fraudulent conduct. . . .
23 only the allegations of fraud are subject to Rule 9(b)’s heightened pleading requirements”).
24 Indeed, by its own terms Rule 9(b) does not require that knowledge be pleaded with particularity.
25 Fed. R. Civ. P. 9(b) (“Malice, intent, knowledge, and other conditions of a person’s mind may be

1 alleged generally.”). Moreover, Rule 9(b)’s particularity requirements are relaxed in
2 circumstances where it may be difficult for the plaintiff to identify the specific actions that a
3 corporate officer took in causing harm to the plaintiff. *Cf. Moore v. Kayport Package Express*,
4 885 F.2d 531, 540 (9th Cir. 1989) (where “corporate fraud may . . . make it difficult to attribute
5 particular fraudulent conduct to each defendant as an individual. . . . the allegations should
6 include the misrepresentations themselves with particularity and, *where possible*, the roles of the
7 individual defendants in the misrepresentations” (emphasis added)).

8 Finally, even if the elements establishing individual liability for corporate activities were
9 required to be pleaded with particularity under the Federal Rules, this would not justify the
10 dismissal of claims against the Individual Movants here. Where potential defects in the
11 particularity of allegations can be remedied by reference to other materials in the record, the
12 court may take notice of these materials. *FTC v. Cantkier*, No. 09-894, 2011 U.S. Dist. LEXIS
13 21076, at *24–26 (D.D.C. Mar. 3, 2011); *Bonilla v. Trebol Motors Corp.*, 150 F.3d 77, 81 (1st
14 Cir. 1998); *Elias Bros. Restaurants v. Acorn Enters.*, 831 F. Supp. 920, 923 n.3 (D. Mass. 1993);
15 *Buccino v. Cont’l Assurance Co.*, 578 F. Supp. 1518, 1524 n.5 (S.D.N.Y. 1983). In light of the
16 parties’ extensive preliminary injunction briefing, *see supra* Section II, the Court would be at
17 liberty to consider documents adding further detail concerning these defendants’ control,
18 participation, and knowledge, including the material concerning

- 19 • Kyle Kirschbaum’s role registering websites for entities known to generate leads
20 for the Ivy Capital Enterprise; payments made by Kirschbaum for multiple
21 domains linked to linked to the Ivy Capital Enterprise; and Kirschbaum’s past
22 role making sales calls and drafting sales scripts [D.E. 11-1 at 29–30];
- 23 • John Harrison’s role registering and paying for domain names used in the Ivy
24 Capital Enterprise; Harrison’s role registering and paying for telephone numbers
25

1 related to the enterprise; and Harrison's role personally monitoring day-to-day
2 business operations and meeting with telemarketers [*id.* at 30]; and

- 3 • Steven Lyman's active involvement in the daily operations of Ivy Capital, Inc;
4 Lyman's past role making sales calls and drafting sales scripts; Lyman's near-
5 daily presence at the offices of Ivy Capital, Inc., and defendant Business
6 Development Division, LLC [*id.*].

7 **D. The Relief Defendants Are Liable to Disgorge the Ill-Gotten Gains**
8 **of the Ivy Capital Enterprise.**

9 Seven relief defendants have moved that Count X, the only count alleged against them,
10 should be dismissed, arguing that if the Complaint fails to adequately allege the underlying
11 wrongdoing of the defendants, the Relief Movants cannot be held liable for receiving ill-gotten
12 gains from these defendants. [D.E. 86 at 7.] Because, as demonstrated *supra* Section III.A–C,
13 the Complaint sufficiently states claims against all defendants for violations of the FTC Act and
14 the Telemarketing Sale Rule, the argument raised by the Relief Movants fails.

15 **IV. CONCLUSION**

16 For the reasons set forth above, the motion to dismiss should be denied.

17 Dated: April 8, 2011

Respectfully submitted,

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24
25

Certificate of Service

I hereby certify that on April 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice of electronic filing to all counsel of record. Additionally, I served:

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